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No. 95-789

IN THE

Supreme Court Of The United States

October Term, 1996

**STATE OF CALIFORNIA,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DIVISION OF APPRENTICESHIP STANDARDS,
DEPARTMENT OF INDUSTRIAL RELATIONS
AND COUNTY OF SONOMA,**

Petitioners,

v.

**DILLINGHAM CONSTRUCTION, N.A., INC. AND
MANUEL J. ARCEO, DBA SOUND SYSTEMS MEDIA,**

Respondents.

On Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit

BRIEF FOR SIGNATORY MEMBERS OF THE COALITION TO PRESERVE ERISA PREEMPTION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE[1]

This brief is being filed on behalf of the following members of the Coalition to Preserve ERISA Preemption (COPEP): Associated Builders and Contractors, Inc., Brown & Root, Inc., The Business Leadership Council, Independent Electrical Contractors, Inc., Public Service Research Council,

[1] Petitioners as well as Respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 37.3(a) of this Court.

and the Free Enterprise Institute, Inc. COPEP was formed in 1993 in response to legislation then being proposed in Congress, H.R. 1036 and S. 1580, to amend the state law preemption provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, et seq.

H.R. 1036 and S. 1580, the ERISA Preemption Amendments of 1993, sought to amend the Act in order to permit state governments to regulate apprenticeship programs and other employee benefit plans through the enforcement of state prevailing wage laws. The present Petitioners in this case, and many of the amici supporting the Petitioners before this Court, were among the most vigorous supporters of the above referenced legislation, advancing many of the same arguments to Congress which they are now presenting to this Court.

COPEP opposed, and helped to defeat, the ERISA Preemption Amendments of 1993. COPEP members expressed the view that broad federal preemption of state laws relating to employee benefit plans is vital to the administration of uniform employee benefits, including apprenticeship training, by employers throughout the country. As is further discussed below, in refusing to pass the ERISA Preemption Amendments, Congress agreed with the need to preserve broad ERISA preemption of state regulation of apprenticeship plans and prevailing wage laws, to the extent such laws relate to such plans. The Ninth Circuit's decision in this case is consistent with that expressed legislative intent.

The COPEP members on whose behalf this amicus brief is filed are concerned that the present Petition constitutes a thinly veiled effort to overturn the will of Congress by narrowing the scope of ERISA preemption. The amici believe that the Ninth Circuit correctly found that the State of California has improperly attempted to regulate the Respondents' apprenticeship plan, in a manner which is preempted by the plain language of ERISA, and that the Court of Appeals decision should therefore be upheld.

Associated Builders and Contractors, Inc. (ABC) is a non-profit trade association of more than 18,500 construction industry contractors and related firms who share the belief that work should be awarded and performed on the basis of merit, regardless of labor affiliation. Many of ABC's members perform work covered by prevailing wage laws in California and other states. Many of ABC's 80 chapters and individual member companies have also spent substantial sums of money to sponsor and administer ERISA-covered apprenticeship plans for the benefit of employees, most (but not all) of whom are non-union. The successful operation of such plans from state to state will be significantly and adversely affected by reversal of the Ninth Circuit's holding.

Brown & Root, Inc. is one of the world's largest construction companies, with thousands of employees. Brown & Root has made a very large investment in employee training and sponsors or participates in apprenticeship programs for the benefit of its employees throughout the country. It is vital to the success of these programs that they be subject to uniform regulation from state to state, and from place to place within each state. Brown & Root is concerned that its substantial investment in employee training will be placed at risk if the arguments advocated by the Petitioners are adopted.

The Business Leadership Council is an association of large and medium sized businesses dedicated to reviving the American economy by restoring opportunity, protecting private property and ensuring personal security and liberty. ERISA preemption of state laws relating to employee benefit plans is critical to the ability of employers to provide fringe benefits, including apprenticeship training, necessary to attract and develop high quality employees and to compete in a global economy.

The Independent Electric Contractors, Inc. (IEC) is a trade association of more than 2,500 electrical contractors in the construction industry. Many IEC chapters and individual

members have spent substantial sums of money to sponsor and administer apprenticeship plans for the benefit of employees. IEC believes that the successful operation of these apprenticeship plans will be jeopardized by reversal of the Ninth Circuit's holding, to the extent that the Court permits state regulation of apprenticeship plans which have been previously protected from state interference by ERISA preemption.

The Public Service Research Council (PSRC) is a non-profit public policy research organization which believes strongly in the right of businesses and employees to be free of unwarranted government regulation. The PSRC views ERISA preemption of state laws relating to employee benefit plans as an important protection of private employee benefits against governmental interference, which should be preserved in accordance with the plain language of the Act.

The Free Enterprise Institute is a non-profit grass roots lobbying organization whose purpose is to mobilize citizen support for initiatives that would promote greater individual freedom and smaller government. The Institute believes that ERISA preemption of state laws must be preserved, and the Ninth Circuit decision upheld, in order to protect employee benefit plans from being subjected to improper state government regulation and interference.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit under review is consistent with the plain language and legislative history of ERISA's preemption provision, which this Court has previously found to preempt conflicting state laws relating to employee benefit plans "in the broadest possible terms." Congress declared ERISA's broad preemption clause to be the "crowning achievement" of the federal law, and Congress has explicitly rejected attempts to exempt state prevailing wage and apprenticeship laws from ERISA's preemptive language.

It is critical to preservation of uniformity in the regulation of apprenticeship programs under ERISA that the Ninth Circuit's decision be upheld. Absent ERISA's protective provisions, employers seeking to provide much needed apprenticeship training around the country will be subject to myriad conflicting state apprenticeship regulations which will be enforced through regulation of the states' equally polyglot prevailing wage laws. As a result, legitimate and beneficial job training plans will be jeopardized, just as the authors of ERISA feared.

Contrary to the Petitioners' arguments, the Ninth Circuit's decision does not undermine enforcement of state prevailing wage laws generally. Rather, ERISA preemption is called for here because California has chosen to ***combine*** enforcement of its prevailing wage law with specific state apprenticeship regulations, and to use this combination as a device to impose state-preferred apprenticeship standards on nonconforming employers. It is this ***direct relation*** between the prevailing wage law and the regulation of employee apprenticeship benefit plans which places the California scheme squarely within the scope of this Court's long line of cases finding ERISA preemption.

There can also be no doubt, contrary to the Petitioners' arguments, that the terms of the challenged statute relate to an apprenticeship "plan" intended to be protected by ERISA preemption. The state law here directly affects the administrative and financial aspects of ERISA-covered apprenticeship plans, in a manner not permitted by the Act.

For these reasons, the present case is consistent with *New York Conference of Blue Cross v. Travelers Ins. Co*, 115 S. Ct. 1671 (1995), and is distinguishable on its facts. Because the California law expressly refers to ERISA-covered apprenticeship and directly binds employers in their choices regarding such plans, the state law should be preempted in accordance with the Court's decisions in *District of Columbia*

v. Greater Washington Board of Trade, 506 U.S. 125 (1992) and *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990).

California's regulation of apprenticeship is unusually intrusive and is not saved by Petitioners' claims that regulation of prevailing wages is a "traditional exercise of the state's police power." Regulation of apprenticeship plans under state prevailing wage laws is a relatively recent development and has been attempted by only a minority of states. This Court has also held, in analogous circumstances, that "tradition" alone is an insufficient ground for ignoring the plain language of ERISA preemption.

The Petitioners are also wrong to contend that the type of state regulation at issue here is "saved" by virtue of the National Apprenticeship (Fitzgerald) Act, 29 U.S.C. §50. That statute only authorizes states to establish apprenticeship standards consistent with and relating to federal registration of apprentices. Nothing in the Apprenticeship Act or its accompanying regulations authorizes or calls upon states to impose sanctions for the failure of an employer to register apprentices in an approved program. Moreover, the state here is not seeking to enforce the federal law at all, but is instead regulating apprenticeship programs in connection with state public works.

The Court should resist the Petitioners' request to exempt state prevailing wage laws from ERISA preemption, to the extent that such laws relate to apprenticeship training plans, as is clearly the case under the presently challenged California law.

ARGUMENT

I. The History of ERISA Establishes Congressional Intent to Broadly Protect Apprenticeship Training Programs from State Interference.

Petitioners' claims rest on a distorted version of history, both as to the purpose of ERISA and the state law "traditions" relating to apprenticeship and prevailing wages. In reality, Congress intended to preempt precisely the kind of state laws which are at issue in the present case, and Congress reaffirmed its intent by rejecting Petitioners' claims for a special exemption for such state laws within the last two years.

As this Court has repeatedly held, Congress enacted Section 514 of ERISA in order to establish the regulation of employee welfare benefit plans as "exclusively a federal concern." *N.Y. Conference of Blue Cross v. Travelers Ins.*, 115 S. Ct. 1671, 1677 (1995), *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

As the Court further noted in *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992), Congress chose preemptive language which is "deliberately expansive." *See also Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 47 (1987). By declaring that ERISA would preempt any state law which "relates" to a covered employee benefit plan, Congress intended to override any state law which "has a connection with or reference to such a plan." *Greater Washington Board of Trade*, *supra*, 113 S. Ct. at 583.

This Court has further held that it is unnecessary to show that the state law was "specifically designed to affect such plans," or that the effect is "direct." *Ingersoll-Rand*, *supra*, 498 U.S. at 139; *accord*, *Travelers Ins.*, *supra*, 115 S. Ct. at 1683. Rather, the Court reaffirmed in *Travelers* that "a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to

adopt a certain scheme of substantive coverage or effectively restrict its choice[s]. . ., and that such a state law might indeed be pre-empted under §514." *Ibid.*

None of this was accidental. The principal reason for Congress's enactment of ERISA was to foster the growth of employee benefit plans. 120 Cong. Rec. 29197 (1974). In order to accomplish this goal, Congress recognized the importance of eliminating the threat of conflicting or inconsistent state and local regulations of employee benefit plans. One of the law's sponsors, Congressman Dent, described the reservation to federal authority of the sole power to regulate the field of employee benefit plans as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974).

Senator Williams, a chief sponsor of ERISA in the Senate, stressed that with the narrow exceptions specified in the Act (relating to insurance contracts, banks, trust companies, or investment companies), federal preemption was intended to apply in its broadest sense to all actions of state or local governments relating to benefit plans. *Id.* at 29933.

It is undisputed that ERISA's drafters deliberately included within the Act's protective coverage any "plan, fund, or program" established or maintained for the purpose of providing employee participants with "apprenticeship or other training programs." 29 U.S.C. §1002(1). At the same time, Congress failed to exempt from its preemption provisions any state laws relating to apprenticeship, including prevailing wage laws. Each of these facts contradicts the Petitioners' arguments that Congress somehow did not intend to preempt the laws at issue in the present case.

Any doubt as to Congress' preemptive intent was removed in 1994, when Congress rejected a large-scale effort to amend ERISA expressly to exempt the type of state laws now before the Court. The Petitioner State of California, together with other state governments and the AFL-CIO, demanded that Congress create an exemption from ERISA preemption

which would allow the states to enforce prevailing wage laws relating to employee benefits and to enforce apprenticeship standards in particular. They did so after several court decisions declared that state enforcement of apprenticeship standards and/or prevailing wage laws in a manner relating to employee benefit plans was preempted by ERISA. *See General Electric Co. v. New York State Department of Labor*, 891 F. 2d 25 (2d Cir. 1989), cert. den., 496 U.S. 912 (1990); *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Committee*, 891 F. 2d 719 (9th Cir. 1989), cert. den., 111 S. Ct. 72 (1990).

Rep. Berman of California introduced H.R. 1036 in the House in February 1993 (after a predecessor bill failed to come to a vote in 1992), and Senator Kennedy introduced S. 1580 in the Senate. H.R. 1036 was extensively debated and passed the House, as amended, on November 9, 1993. 139 Cong. Rec. H8977 (Nov. 9, 1993).[2] Though reported in the Senate in July, 1994, however, the bill could not muster suffi-

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[2] H.R. 1036 would have amended Section 514(b) of ERISA to state: "Subsection (a) shall not apply to -- (A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting -- (i)the payment of employee benefit plan contributions or costs, (ii)the payment of wages in lieu of such contributions or costs, or (iii) the payment of a combination of wages and such contributions or costs; except that this subparagraph shall not be construed toe exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or operations of, any employee benefit plan; [or] (B)any provision of State law to the extent that such provision--(i)establishes minimum standards for the certification or registration of apprenticeship or other training programs, (ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or (iii) makes certified or registered apprenticeship or other training an occupational qualification, and does not conflict with any right, requirement, or duty established under this title; . . . ."

cient votes for passage, and died with the end of the Congressional session that year.

The debates in the House are revealing. Congressman Goodling (R-PA), then ranking minority member of the House Education and Labor Committee, declared his opposition to the bill on the following grounds:

> H.R. 1036 now seeks to depart from ERISA's well-reasoned preemption provision by allowing states excessively broad authority with regard to apprenticeship and training laws. When ERISA was enacted in 1974, its sponsors made clear their intention for the broadest possible preemption of State laws in order to eliminate the threat of restrictive, conflicting, and inconsistent State and local regulation. They were seeking to expand and enhance the benefits employers provided their workers by establishing a single, consistent set of rules that applied to all employee benefit plans.
>
> In short, ERISA's preemption provisions were originally intended, and continue to be, as much in employees' best interest as they are in employers'. This is no more clear than in the case of ERISA apprenticeship and training programs. ERISA has encouraged their development and expansion.
>
> However, by allowing States to restrict the types of apprenticeship and training programs employers may utilize, H.R. 1036 could preclude many employers from training their own workers, thereby increasing their costs while at the same time diminishing their available pool of skilled workers.

Id. at H8962.

Significantly, as a result of the 1994 Congressional elections, Representative Goodling became Chairman of the House Economic and Educational Opportunities Committee, the Committee with primary jurisdiction over ERISA issues.

Since 1994, Republican Congressional leaders have understandably made no effort to resurrect the bill which they so vigorously opposed.

If enacted, H.R. 1036 would have accomplished exactly the result sought by the Petitioners in the present case by removing prevailing wage laws and apprenticeship standards from the scope of ERISA preemption. But the bill did not pass both houses of Congress, notwithstanding vigorous debate. This Congressional refusal to depart from existing law, according to this Court's holdings, is "instructive", with regard to Congress's intent under ERISA. *See Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 836, n.12 (1983)

The Court should defer to the will of Congress and should not permit the Petitioners to make an "end run" around Congressional opposition to narrowing the scope of ERISA preemption. As is further discussed below, the type of state law at issue here directly and intrusively "relates" to ERISA-covered apprenticeship plans, in a manner which would significantly undermine the preemptive intent of ERISA, if allowed to stand.

II. The Express Incorporation of State Apprenticeship Standards into California's Prevailing Wage Enforcement Scheme is Not a "Traditional Exercise of State Police Powers" or a Mere Law of General Application.

Petitioners and their amici have similarly distorted the history of prevailing wage and apprenticeship laws in order to justify their present action. They have argued that California's laws are exempt from ERISA preemption because they are part of a long historical tradition of state regulation of wages and apprenticeship.

Petitioners have overstated their case. In reality, it is a fairly recent development, in those states which have done it at all, for states to have combined their prevailing wage law with direct references to and enforcement of apprenticeship

standards affecting the administration of private apprenticeship plans or programs.

States prevailing wage laws, where they exist at all, vary widely in scope and content.[3] Most of the state prevailing wage laws originally made no reference to fringe benefits. (The federal Davis-Bacon Act, 40 U.S.C. §276a, did not address fringe benefits until 1962). For example, New York did not seek to include fringe benefits within the scope of its prevailing wage law until 1956, and did not attempt to address apprentices under the prevailing wage law until 1966, only 8 years before ERISA was passed. N.Y. Lab. Law §220(3)(McKinney 1986).[4]

Many of the state prevailing wage laws listed by Petitioners impose no state requirements relating to apprenticeship programs at all. *See*, *e.g.*, Mo. Code §290.210 (1937). Administrative rulings in those states which do address apprenticeship are of much more recent vintage. *See* Mo. Prev. Wage Law Rules, 8 CSR 30-3.030 (1990). Perhaps most significantly, most state prevailing wage laws and regulations

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[3] Professor Thieblot, whose 1987 study of state prevailing wage laws is cited in the amicus brief of the States (at p.10, n.3), has more recently conducted a comparative survey of state prevailing wage laws. *See State Prevailing Wage Laws: An Assessment at the Start of 1995* (ABC ed. 1995). Thieblot's comparison shows that these laws vary widely from state to state, ranging from those which "are mild enough not to be particularly intrusive in the way contracting is done" to those which "open up a whole new Byzantine world of government intervention to the contractor . . . ." *Id.* at 12. According to Thieblot, California's prevailing wage law ranks as the second most onerous in the country (one point behind Massachusetts). "In almost all particulars, it is more restrictive and more highly labor oriented than the federal [Davis-Bacon] law." *Id.* at 31.

[4] A sampling of other state prevailing wage laws reveals similar gaps between enactment of the statute and the much more recent references to apprenticeship in connection with those laws. *See*, *e.g.*, Tenn. Code Ann. §12-4-401 (enacted in 1953; apprenticeship not referenced until 1976); Wash. Rev. Code §39.12.021 (enacted in 1945; apprenticeship not referenced until 1963).

other than California permissively define apprenticeship as any program which meets federal *or* state standards. *See*, *e.g.*, Wisconsin ILHR 290.02 (1967)("Apprentices may work at less than the prevailing wage rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program administered by the U.S. department of labor, a state agency recognized by the U.S. department of labor, or under Wisconsin's apprenticeship law").

In addition, notwithstanding Petitioners' claims of historical state apprenticeship regulation (Pet. Br. at 2-6), most states have treated apprenticeship as a voluntary program conducted according to terms established between employer associations and employees. Until recently, states did not attempt to dictate the terms of apprenticeship programs, nor did they attempt to enforce state standards through regulation, as opposed to voluntary certification.

The voluntariness of apprenticeship standards was an essential element of the National Apprenticeship Act, 29 U.S.C. §50, when that law was passed in 1937. As noted in *National Elevator Industry, Inc. v. Calhoon*, 957 F. 2d 1555, 1562 (10th Cir. 1992):

> Section 50 does not depend upon states to enforce its provisions; in fact, there is nothing in §50 for states to enforce. Section 50 merely seeks to facilitate development of apprenticeship programs - it does not mandate apprenticeship programs or seek to discourage other training programs.

Thus, Petitioners are wrong to state that any historical tradition of either prevailing wage law or apprenticeship standard enforcement justifies the broad exemption from ERISA preemption which they now espouse. The number of states which have combined prevailing wage laws with apprenticeship certification in such a way as to convert voluntary train-

ing programs into mandatory "sole source" programs is small and is not of long standing.

Finally, Petitioners have ignored an unfortunate aspect of the history of state apprenticeship regulation, which is the extent to which state standards have been abused by special interest groups to control and limit the availability of apprenticeship training in the construction industry. In particular, it is clear that the series of cases which first raised the issue of ERISA preemption in the area of apprenticeship came about because union-dominated state apprenticeship councils discriminated against or otherwise interfered with the administration of non-union or non-approved union apprenticeship training programs.

As a result of these state activities, ERISA's express goal of encouraging diverse and creative fringe benefit programs for employees throughout the country has been threatened. *See Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint App. Comm.*, 891 F. 2d 719 (9th Cir. 1989), *cert. den.*, 111 U.S. 72 (1990) (state agency banned union contractor from public works because contractor refused to participate and make contributions to state-mandated ERISA-covered apprenticeship plan); *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F. 2d 270 (9th Cir. 1991)(BAT-approved apprenticeship program was arbitrarily denied state council approval and thereby penalized under state prevailing wage law); *Boise Cascade Corp. v. Peterson*, 939 F. 2d 632 (8th Cir. 1991), *cert. den.* __ U.S. __ (1992)(state sought to impose arbitrary minimum jobsite ratio rule of apprentices to journeymen, directly affecting all non-conforming apprenticeship programs); *see also Associated General Contractors, San Diego Chapter, Inc. v. Smith*, 74 F. 3d 926 (9th Cir. 1996); *Inland Chapter of Associated General Contractors of America v. Dear*, 77 F. 3d 296 (9th Cir. 1996); *National Elevator Industry v. Calhoon*, 957 F. 2d 1555 (10th Cir. 1992); *Joint Apprenticeship & Training Council of Local 363 v. New York State Dept. of Labor*, 984 F. 2d 589 (2d Cir. 1993); *Southern*

California Chapter ABC v. California Apprenticeship Council, 4 Cal. 4th 422, 14 Cal. Rptr. 2d 491 (1992).

If the Court now retreats from or weakens the scope of ERISA protection outlined in these and other cases, which Congress has refused to do, then the ability of employers to provide the important benefit of employee training to their employees will be significantly hindered. As is further discussed below, nothing in this Court's decisions on ERISA preemption supports the Petitioners' call for such a retreat.

III. The California Laws At Issue Here Plainly "Relate to" ERISA-Covered Apprenticeship Plans, Within the Holdings of this Court's *Travelers* and *Board of Trade* Decisions, and Must be Found to Be Preempted.

Under the plain language of ERISA, as consistently interpreted by this Court, California's *atypical* combination of prevailing wage and apprenticeship laws directly relates to ERISA-covered apprenticeship plans and must be preempted. In this regard, contrary to the Petitioners' claim, nothing in this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995), exempts the presently challenged laws from ERISA's preemption bar. Rather, the consistent interpretations of ERISA by this Court, including the *Travelers* case, all support the continued preemption of the direct and intrusive state interference with apprenticeship training which Petitioners are now advocating.

At the outset, there can be no doubt that the apprenticeship plan affected by the combination of state laws at issue here constitutes an ERISA-covered employee benefit "plan, fund or program." Petitioners do not seriously argue this point in their Brief, but the amicus briefs of the AFL-CIO and the United States spend an inordinate amount of time attempting to distinguish between the funding of apprenticeship

programs and the standards by which such programs are operated. The Petitioners' amici are mistaken.

The factual record of this case is undisputed in establishing that the Respondents' apprenticeship program, which was denied approval by the state, was an ERISA-covered employee benefit plan. As has been mentioned above already, ERISA expressly covers apprenticeship "plans, funds or programs", and both the district court and the Ninth Circuit correctly found that the particular program at issue here met the statutory definition.

The distinction posed by the AFL-CIO between a "program," and a "program to fund a program" (AFL-CIO Brief at 4), if it exists at all, is irrelevant to the present case, because the Respondents' apprenticeship program clearly constituted both. The program was collectively bargained and established a plan by which the apprenticeship program would be funded and operated. Notwithstanding these classic features of an ERISA-covered employee benefit plan, the state refused to allow the contractor to employ apprentices as apprentices, i.e., at apprentice wage rates on public works.

This case is thus completely unlike the decision of *Massachusetts v. Morash*, 490 U.S. 107 (1989), where the Court found no preemption because unused vacation time paid out of general assets did not constitute an employee welfare benefit plan. The Respondents here clearly did have an ERISA-covered employee benefit plan to provide apprenticeship training, and the state clearly intruded into the Respondents' administration and implementation of their plan, in a manner prohibited by ERISA.

The Petitioners' amici also attempt inappropriately to distinguish between state laws which regulate apprenticeship standards and those which regulate program financing. The California laws at issue here clearly regulate both, by nature of the intrusive approval process, as enforced by the prevailing wage law. *See* Cal. Lab. Code §§1771 and 1771.5. This

combination of laws directly and significantly affects both the administrative and financial aspects of apprenticeship programs, which are integrally related to each other in any event. *See Hydrostorage, Inc., supra*, 891 F. 2d at 728.[5]

The real question at issue in this case then is simply whether California's unusually intrusive combination of apprenticeship and prevailing wage laws "relates to" Respondents' apprenticeship program within the meaning of ERISA. Petitioners apparently believe that the *Travelers* case, though unanimously decided less than three years after the 8-1 decision in *Greater Washington Board of Trade*, nevertheless somehow accomplished a sea change in the Court's standard for ERISA preemption. (Pet. Br. at 21-22). The *Travelers* opinion itself does not support Petitioners' view. Rather, the holding of that case is consistent with the long established interpretations of ERISA preemption by the Court, as summarized in both *Travelers* and *Greater Washington Board of Trade*, as well as in *Ingersoll-Rand* and other predecessor decisions.

Thus, the Court has consistently held that a state law will be found preempted if it "has a connection with or refers to" an employee welfare benefit plan, and that "the basic thrust of the preemption clause is to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers, supra*, 115 S. Ct. at 1677-78; *accord, Greater Washington Board of Trade, supra*, 113 S. Ct. at 583. The state law is preempted whether its effect on ERISA-covered plans is direct or indirect, particularly

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[5] The amici's narrow view of the term "apprenticeship program" also conflicts with the existing federal definition set forth in 29 C.F.R. §29.2(l). That regulation states: "Apprenticeship program shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement."

where the law forces an ERISA plan to adopt a certain scheme of substantive coverage. *Travelers*, *supra*, 115 S. Ct. at 1683.

The different outcomes in *Travelers*, on the one hand, and such cases as *Greater Washington Board of Trade* and *Ingersoll-Rand*, on the other, are explainable, not surprisingly, by the differences in the state laws themselves. In this respect, the present case is simply much closer in its facts to the latter two decisions and, like those state laws, the Calfornia laws at issue here should be preempted.

First, unlike the statute in *Travelers,* but like the law in *Greater Washington Board of Trade*, the California prevailing wage law incorporates laws *expressly referring* to apprenticeship programs. Cal. Labor Code §1777. Much of the Court's discussion in *Travelers* arose from the fact that it was interpreting the "connection with" component of the "relation to" formulation, *i.e.*, the statute under review there did not actually refer to ERISA-covered plans. Such an inquiry is unnecessary here, because unlike the general cost surcharges in *Travelers*, the challenged statute here expressly refers to apprenticeship and is preempted on that ground alone. *See Greater Washington Board of Trade*, *supra*, 113 S. Ct. at 583.[6]

In addition, the surcharge statute at issue in *Travelers* did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Travelers*, *supra*, 115 S. Ct. at 1679. By contrast, the present state law, by requiring apprenticeship programs to obtain state approval in order to comply with the state prevailing wage law, plainly does bind plan administrators to abide by the state's regulation of their ERISA plans. The detailed apprenticeship requirements set out in the California Labor Code thus bear no resemblance to the flat surcharges construed in *Travelers* and require a different result.

[6] The present statute is also presumptively preempted, unlike the statute at issue in *Travelers*, because the California law is "specifically designed" to affect ERISA plans and because it mandates specific benefits. *See Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981); *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990).

As the Ninth Circuit held in *Inland Empire Chapter v. Dear,* 77 F. 3d 296 (9th Cir. 1996) and *ABC National Line Erection Apprenticeship v. Aubry*, 68 F. 3d 343, 345 (9th Cir. 1995), both of which construed *Travelers*, contractors facing California's type of apprenticeship/prevailing wage regulation "must find a state approved program or forego using apprentices," and "suffer direct injury due to the discouragement of unapproved programs." For each of these reasons, under the holding of *Travelers* itself, the California combination of laws is preempted by ERISA. It simply cannot be said of California's law, as was true of the surcharges in Travelers, that "the state law has only a tenuous, remote, or peripheral connection with covered plans." 115 S. Ct. at 1680. *See also Greater Washington Board of Trade*, 506 U.S. at 130, n.1.

Finally, the Court in *Travelers* was concerned that a finding of ERISA preemption in that case would have "barred any state regulation of hospital costs," a "traditional" exercise of state authority. 115 S. Ct. at 1681. By contrast, the Ninth Circuit's decision does not broadly preempt state prevailing wage laws in general, but only to the extent that they relate to apprenticeship plans by imposing state regulation on such plans.

This distinction has recently been made clear by the Ninth Circuit itself, in the case of *WSB Electric, Inc. v. Curry*, 1996 U.S. App. Lexis 16027 (9th Cir. July 5, 1996). There, the court declined an invitation to invalidate California's entire prevailing wage law, distinguishing the indirect effects of the law in general from the direct impact of the apprenticeship provisions described in the *Dillingham* case. The Petitioners' announced fears for the enforceability of their general prevailing wage statute have thus been shown to be groundless. At the same time, because California and a very few other

states have extended the reach of their laws by combining them with and expressly enforcing state apprenticeship standards which directly impact upon ERISA-covered plans, the challenged statute must be found to be preempted.

As has already been shown above, there is no tradition of combining state prevailing wage laws with state enforcement of apprenticeship standards, as compared to the tradition of state regulation of health care costs generally which was present in *Travelers*.[7] In addition, in *Travelers* the Court remarked that "there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." 115 S. Ct. at 1681. Here, on the other hand, Congress has quite recently made clear its intent to prevent state prevailing wage and apprenticeship laws from interfering with private apprenticeship programs. See discussion above at pp. 8-11.

IV. The Savings Clause of ERISA Does Not Save California's Prevailing Wage Law From Preemption to the Extent that It Incorporates and Imposes State Apprenticeship Standards on ERISA-covered Plans.

Petitioners' final claim is that, to the extent that their law does relate to ERISA-covered apprenticeship plans, as it certainly does, such effects are "saved" by the National Apprenticeship ("Fitzgerald") Act, 29 U.S.C. §50 and the savings clause of ERISA Section 514(d).[8] As this Court held in *Shaw*

[7] Significantly, the Court confronted a "traditional" exercise of state authority in *Greater Washington Board of Trade*, in the form of state workers compensation laws. The Court nevertheless found that the preemptive provisions of §514 applied, once it was determined that the law in question related to a covered plan. 113 S. Ct. at 584.

[8] The savings clause states: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. §1144(d).

v. Delta Airlines, Inc., 463 U.S. 85 (1983), however, the savings clause operates only to exempt provisions of state laws upon which federal laws depend for their enforcement,. . . ." California's enforcement of state apprenticeship standards on state public works projects, through a combination with its prevailing wage laws, is not necessary to the enforcement of any federal law.

As noted above, the Tenth Circuit in *National Elevator Industry, Inc. v. Calhoon*, *supra*, 957 F. 2d at 1561, correctly observed that Section 50 of the National Apprenticeship Act "does not depend upon states to enforce its provisions; in fact, there is nothing in §50 for states to enforce." Section 50 merely seeks to facilitate development of apprenticeship programs - it does not mandate apprenticeship programs or seek to discourage other training programs. The Tenth Circuit further agreed with the Ninth Circuit's holding that "the [Fitzgerald Act] regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms." *Citing Hydrostorage*, *supra*, 891 F. 2d at 731.

For these reasons, the state law at issue here likewise is not saved by the Fitzgerald Act. California Labor Code Section 1777.5 is not enforcing federal law. Instead, the state is enforcing state apprenticeship standards on state public works projects paid for with state funds and in combination with a state prevailing wage law. The savings clause of ERISA is not implicated by the Fitzgerald Act in the present case and the California Law must be preempted.

CONCLUSION.

The ERISA preemption clause has served well the fundamental goal of the Act, to promote the development of private employee benefit plans, including apprenticeship programs. It is important that the Court preserve the vitality of ERISA preemption against uniquely intrusive state laws like California's which will otherwise hinder the further development of much needed training of employees in the construction industry. For each of the reasons set forth above and in Respondents' Brief, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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